

1 The Honorable Thomas S. Zilly
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 OUR MONEY OUR TRANSIT and ROBERT
10 MACHERIONE,

11 Plaintiffs,

12 v.

13 FEDERAL TRANSIT ADMINISTRATION;
14 PETER M. ROGOFF, in his official capacity as
Administrator, Federal Transit Administration;
15 and RICHARD F. KROCHALIS, in his official
capacity as Regional Administrator, Federal
Transit Administration Region X Office,

16 Defendants,

17 LANE TRANSIT DISTRICT,

18 Defendant Intervenor.

19 Case No. 2:13-cv-01004-TSZ
20

DEFENDANT INTERVENOR LANE
TRANSIT DISTRICT'S OPPOSITION
TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AND CROSS
MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

NOTED ON MOTION CALENDAR:
April 25, 2014

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1 Pursuant to Fed. R. Civ. P. 56 Intervenor respectfully files this Opposition to Plaintiffs'
 2 Motion for Summary Judgment and Cross Motion for Summary Judgment.

3 **I. INTRODUCTION**

4 Plaintiffs ask this Court to set aside the results of over six years of exhaustive planning
 5 for a much needed public transit service. This process included hundreds of community meetings
 6 and thousands of public comments -- resulting in significant project modifications after
 7 consideration of scores of alternatives. Each alternative was carefully and publicly vetted under
 8 various criteria before the environmentally preferable alternative was identified. Plaintiffs, a
 9 taxpayer group and its spokesperson, seek to stop the project. They oppose the spending of tax
 10 money on the project, not the environmental implications of it. However, their taxpayer agenda
 11 does not afford them standing under the National Environmental Policy Act ("NEPA") -- they
 12 cannot stumble into NEPA's zone of interests. Moreover, the procedural requirements of NEPA
 13 do not mandate that the agencies choose Plaintiffs' preferred alternative or require any greater
 14 level of analysis than was already performed over the past six years.

15 **II. BACKGROUND**

16 **A. West Eugene EmX Extension ("WEEE")**

17 In 2007, the Eugene City Council and the Lane Transit District ("LTD") Board of
 18 Directors identified a need for public transit service along an 8.8-mile stretch of the West 11th
 19 Avenue Corridor -- the primary east/west transit corridor linking the west side of Eugene to
 20 downtown. (AR118825). To serve this need, LTD, the county transit agency providing daily bus
 21 service to nearly 300,000 residents, proposed the West Eugene EmX Extension ("WEEE") -- a
 22 new line of the Emerald Express ("EmX") Bus Rapid Transit service that would run from the
 23 main downtown Eugene Station through the West 11th Avenue Corridor. (AR118847). The fleet
 24 of hybrid busses used on the EmX have been recognized nationally as sustainable public
 25 transportation. (AR7309). The busses run on dedicated lanes that allow them to bypass traffic
 26
 27

1 and operate more efficiently for riders and the environment. (*Id.*) The WEEE will also improve
 2 several intersections, and bicycle lanes and pedestrian crossings along the Corridor. (AR118045).

3 Between 2007 and 2013, in anticipation of seeking funding for the WEEE under the
 4 FTA's New Starts program, LTD identified and evaluated various alternatives to serve the need
 5 along the West 11th Avenue Corridor. (AR117951). The study examined a broad range of bus
 6 and bus rapid transit alternatives to link the residential and commercial activity centers along the
 7 corridor with the region's main business districts -- Eugene and Springfield -- and the region's
 8 largest employers, the University of Oregon and Peace Health Hospital. (AR118825). At every
 9 stage, LTD facilitated the review of project information and incorporated feedback from the
 10 communities' diverse stakeholder groups. (AR118841-42). LTD also "coordinated with local,
 11 state and federal agencies regarding the conceptual designs and evaluations of those designs."
 12 (AR115274). Ultimately, the five-year study produced a record more than 130,000 pages long.

13 As a preliminary step in the process, LTD drafted a Purpose and Need Statement based
 14 on previous planning work and input from the public. (AR118848). LTD published a Notice of
 15 Intent to conduct an environmental review of the WEEE, and began conducting workshops with
 16 local, state and federal agencies and open houses with the public. (*Id.*) In the fall of 2007, LTD
 17 established the WEEE Corridor Committee -- comprised of representatives from various
 18 agencies, businesses, neighborhoods and other interested groups. (*Id.*) The Committee refined
 19 the Statement based on public and agency feedback and the LTD Board adopted the final
 20 Purpose and Need Statement on March 19, 2008, (*Id.*),¹ which states in part:

22 The purpose of the proposed WEEE project is to implement high-capacity public
 23 transportation service, in the West 11th Corridor (east/west), utilizing the adopted
 24 high-capacity transit mode identified in the Regional Transportation Plan, that is
 visually appealing service throughout the life of the project.

25 (AR118850). The Statement also detailed the need for the project based on historic and projected
 26 increases in traffic congestion along the corridor and the resulting deteriorating reliability of

27 ¹ LTD and the WEEE Corridor Committee considered 396 comments on the proposed Statement. (AR115265).

1 public transportation there and the local and regional land use and development plans, among
 2 others. (AR118850-51). Based on the Statement, LTD established eight criteria by which to
 3 compare alternatives and to evaluate their effectiveness: 1) improve reliability of service; 2)
 4 improve efficiency of service to maximize scarce resources; 3) support local development
 5 consistent with adopted community plans; 4) accommodate future growth; 5) consider needs of
 6 pedestrians, bicyclists, and motorists; 6) provide fiscally stable public transportation; 7) protect
 7 resources in the natural and built environment; and 8) support LTD's sustainability policy and
 8 the City's efforts to reduce greenhouse gas emissions. (AR118851-52).

9 Using these criteria, over the next two years, LTD evaluated and eliminated dozens of
 10 alternatives. A large part of this process occurred at design workshops, and other public outreach
 11 events. (AR118860). FTA and LTD also consulted with the U.S. Army Corps of Engineers, the
 12 Bureau of Land Management, the U.S. Fish and Wildlife Service, and the Oregon Department of
 13 State Lands to assess the project's potential effects on protected species and wetlands and to
 14 modify the WEEE to minimize its effects on sensitive resources. (AR115156).

15 By early 2010, LTD had identified 58 alternatives for further evaluation through
 16 technical impact studies: the No-Build, or no action alternative; the Transportation System
 17 Management ("TSM"), or low-cost capital improvements alternative; and three bus rapid transit
 19 ("BRT")² alternatives with 56 unique routing combinations. (AR118831). The three BRT
 20 alternative alignments were (1) West 13th Avenue-West 11th Avenue; (2) West 6th/7th Avenues-
 21 West 11th Avenue; and (3) West 6th/7th Avenues-West 7th Place. (AR117955).

22 By June 2010, based upon the findings of technical impact studies,³ LTD staff
 23 recommendations, public input, and advice from the Eugene City Council and other public
 24

25 ²BRT was adopted as the preferred strategy for the Eugene-Springfield metropolitan area following an extensive
 26 Major Investment Study and subsequent Regional Transportation Plan, adopted in 2001 (AR117960).

27 ³Between June and September 2010, LTD commissioned more than twenty technical studies to evaluate the impact
 of the WEEE on various biological, ecological and geological resources, land use, public spaces, and historic,
 archaeological and cultural resources, among others. (AR119175-78).

1 bodies, the LTD Board eliminated 46 of those BRT routing combinations.⁴ (AR118864). Thirty-
 2 two of the BRT routing combinations were eliminated because of their potential to have
 3 significant adverse impacts on protected species, critical habitat, sensitive areas and wetlands,
 4 parklands, the multiuse trail, and cultural resources. (*Id.*)⁵ Another fourteen BRT options were
 5 eliminated after the studies revealed that the high ratio of capital costs to projected ridership
 6 would not address the city's public transit needs. (*Id.*)

7 Thereafter, the No-Build, TSM alternative and the remaining 10 BRT alignment
 8 alternatives were advanced for further consideration in a detailed Alternatives Analysis ("AA").
 9 (AR118865). The LTD Board advanced those ten BRT alternatives finding that the two along
 10 West 13th Avenue-West 11th Avenue would "[t]end to have less likelihood to impact parklands
 11 and open spaces," the four along West 6th/7th Avenues-West 11th Avenue would "[a]void
 12 potential for impact to environmentally-sensitive natural resources," and the four along West
 13 6th/7th Avenues-West 7th Place would "serve a relatively high number of acres of vacant and
 14 redevelopable land." (AR118458). As it did consistently throughout the study, LTD used the
 15 eight criteria of effectiveness discussed above, to weigh the benefits and impacts of each
 16 alternative, including engineering and cost (AR118084-109), travel demand (AR118062-82),
 17 transportation and parking impacts (AR118110-164), and various environmental factors.
 19 (AR118166-290). LTD consulted with the FTA at every step in the AA process. (AR115156-57).

20 The Draft AA Report concluded that the West 13th Avenue-West 11th Avenue alignment
 21 alternative performed best from a technical perspective and preliminarily recommended it as the
 22 Locally Preferred Alternative ("LPA") for the WEEE. (AR118343). The determination was
 23 based on operating and cost efficiencies, higher safety and mobility, and better support of the
 24 BRT system plan. (AR118342). The West 6th/7th Avenues-West 11th Avenue alternative ranked
 25 second as a result of higher projected number of property acquisitions and tree removals, and

26 ⁴ The alternatives were scored based on how effectively they met the project's objectives. The scores allowed for a
 27 comparison of the alternatives during the elimination process. (AR118442; AR118469-AR118473).

⁵ Additionally, several of those routes were also found to negatively impact low income housing. (AR118864).

1 potential conflicts with the BRT System Plan. (AR118343). The West 6th/7th Avenues-West 7th
 2 Place alternative followed a distant third, and the No-Build and TSM options were identified as
 3 the least effective alternatives. (*Id.*) The Draft AA was published in October 2010. (AR117981).
 4 After the release of the Draft AA Report, LTD received hundreds of comments that led to
 5 modifications and clarification of the AA. (*Id.*)

6 Contemporaneously with the release of the Draft AA, LTD convened a group of local
 7 decision-makers to assist in the selection of the LPA.⁶ (AR117983). The Joint Locally Preferred
 8 Alternatives Committee was composed of the Eugene Mayor, two Eugene City Councilors, two
 9 representatives from the Central Lane Metropolitan Policy Committee, and three representatives
 10 from LTD. (AR117983). The Committee served as a conduit of information between LTD and
 11 the decision-making bodies represented by its members. (*Id.*) The Committee and the project's
 12 three decision-making bodies addressed technical and community issues with the alternatives
 13 studied, including the preliminary LPA. (AR118868). LTD held two open houses and four public
 14 hearings concerning the selection of the LPA, and a joint public hearing of the Eugene City
 15 Council, the Metropolitan Policy Committee, and the LTD Board to take public testimony about
 16 the preliminary recommendation of the West 13th-West 11th Avenue alternative as the LPA.
 17 (AR117990-91). The Committee also worked with the project team to develop mitigation
 18 measures addressing potential impacts to property, land uses, parking, driveways, and businesses
 19 for the alternatives. (AR0118868). LTD logged 1,225 comments from the public and government
 20 agencies on the WEEE and the selection of the LPA. (AR117992). It appropriately considered
 21 the input received and incorporated suggestions. (AR115159).

23 As a result of the public comments on the Draft AA, and the public process led by the
 24 Joint LPA Committee, of the 10 alternatives studied in the AA, the four West 6th/7th Avenues-
 25 West 11th Avenue alternatives that required adding a lane were eliminated because of their

26 _____
 27 ⁶ In addition to the Joint LTD Committee, four other committees contributed to the selection of the LPA. In all, these
 committees held 24 meetings to review the Draft AA, and the information and public comments concerning the
 WEEE and to develop recommendations. (AR117984-85).

1 potential impacts on abutting properties and the character of downtown Eugene. (AR118868).
 2 The remaining two alternatives that would travel along West 7th Place were also eliminated
 3 because there was not sufficient population or ridership projections along those routes, the routes
 4 would have had an adverse impact on the trucking industry in the area, and there was no public
 5 or agency support for the alternative. (*Id.*) The TSM Alternative was eliminated because of its
 6 relatively high operating cost per trip and because the Committee determined it did not meet the
 7 purpose of the project. (*Id.*) Ultimately, the three-decision making bodies represented in the
 8 Committee voted to support a mitigated version of the West 6th/7th Avenue alternative instead of
 9 the West 13th-West 11th Avenue alternative that had been preliminarily recommended as the LPA
 10 in the Draft AA. (AR118732). The decision was based on the Committee's work and public
 11 input on the Draft AA, as discussed above, and the decision-making bodies' determination that
 12 the mitigated West 6th/7th Avenue alternative would better support the City's goals and needs,
 13 including future development and employment.⁷ (AR118764; AR118778-80; AR118795).

14 The mitigated West 6th/7th Avenues-West 11th Avenue ("West 6th/7th Avenue") alternative
 15 identified as the LPA was modified considerably during the public process that occurred after the
 16 release of the Draft AA to:

- 17 • Avoid serious issues with wetlands, endangered species, and recreation/parklands
 19 as a result of a revised path ending 2 miles east of the original terminus;
- 20 • Avoid the Amazon Creek and adjacent trail altogether, except for at one existing
 22 roadway crossing and at two new multi-purpose path crossings;
- 21 • Avoid the need for street improvements that would impact several historic
 23 properties along the corridor;
- 22 • Require significantly less property acquisition than anticipated in the original
 24 LPA;
- 23 • Avoid adverse impacts to established residential neighborhoods; and
- 24 • Affect far fewer street and landscape trees than earlier iterations.

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 26
 27 ⁷ The LPA will contribute to the City's goals of reducing greenhouse gas emissions (AR119122), connect the
 region's highest-growth centers, and encourage development along major arterial corridors. (AR119126).

1 (AR118748).⁸ These modifications further avoided and reduced potential impacts to the natural
 2 and built environment -- pushing the project well below the threshold of "significant" impacts
 3 that would require an Environmental Impact Statement ("EIS"). (AR118736-37). As a result,
 4 FTA determined that the project's environmental review under NEPA be accomplished with an
 5 Environmental Assessment ("EA"). (AR118748). This determination did not foreclose the
 6 possibility that an EIS may become necessary if the EA showed the project would have
 7 significant adverse impacts. (AR115157). The U.S. Army Corps of Engineers, the federal
 8 cooperating agency under NEPA, concurred with the FTA's decision. (AR118748).

9 The EA built on the results of the AA and evaluated the transportation benefits,
 10 environmental impacts, and financial implications on the natural and built environment of two
 11 alternatives: the No-Build alternative (*i.e.* no changes to the baseline) and the LPA. (AR118869).
 12 In addition, the EA dedicated a chapter to explaining the alternatives previously analyzed and the
 13 process that ultimately resulted in the two alternatives discussed in the EA. (AR118859-95).
 14 Using the eight measures of effectiveness used to evaluate all alternatives through the study,
 15 LTD determined in the EA that

16 [T]he LPA as compared to the No-Build Alternative better meets the purpose of
 17 the project, which is to provide efficient, effective, and dependable high capacity
 18 transit service in the West 11th Avenue Corridor. The LPA also achieves land use
 19 and transportation goals, catalyzes economic opportunities, and protects
 environmental resources.

20 (AR119126). The EA concluded that "[o]verall, taking into account mitigation, LTD does not
 21 expect that building and operating the LPA would cause significant adverse effects."
 22 (AR118832). The draft EA was published on July 16, 2012. (AR115157). The agencies extended
 23 the public comment period on the EA from the required 30 days to 45 days to provide the public
 24 with sufficient time to consider all the materials and provide comment. (AR115159). In all, 1,569
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26
 27 ⁸ Plaintiffs make no distinction between the West 6th/7th Alternative considered in the Draft AA and the modified
 West 6th/7th Alternative selected as the LPA -- ignoring the mitigation measures that ultimately led to the selection of
 that alternative as environmentally preferable in comparison to Plaintiffs' preferred alternative.

1 separate comments on the EA were received. (AR115160). The comments did not reveal any
 2 additional, material information or raise new issues. (*Id.*)

3 The FTA independently evaluated the adequacy of the EA and made a Finding of No
 4 Significant Impact ("FONSI"). (AR115162). It found that the WEEE would have only short-term
 5 construction impacts on residents and businesses along the alignment, and that the noise, dust
 6 and fumes during construction were capable of being mitigated. (AR115163-64). The FONSI set
 7 forth detailed mitigation measures with respect to noise and vibration, air quality, visual and
 8 aesthetic resources, and various other ecological and geological issues. (AR115282-301). FTA
 9 found that "with the accomplishment of these mitigation commitments, LTD will have taken all
 10 reasonable, prudent, and feasible means to avoid or minimize any potential significant impacts
 11 from the proposed actions." (AR115162). Importantly, FTA concluded the LPA would have
 12 benefits to the environment, including reducing the regional vehicle miles traveled and air
 13 pollution emissions as compared to the No-Build. (AR115164).

14 **B. Plaintiffs Our Money Our Transit and Robert Macherione**

15 OMOT is a "transit watchdog group" formed solely to protest the operational cost of the
 16 WEEE. (*See* Ex. 1 at 1-3). Macherione is OMOT's spokesperson.⁹ *See* (Ex. 2). Plaintiffs oppose
 17 the WEEE because they believe "it's a waste of money" that will hurt small businesses and
 18 taxpayers. *See* (Ex. 3). *See* (AR79500-01); (Ex. 1 at 2) (OMOT believes the WEEE will have a
 19 negative economic impact on nearby properties and businesses). As Plaintiffs have made clear,
 20 their concerns are unrelated to the types of impacts covered by NEPA. Instead, "[t]he intent of
 21 the suit is to stop this unneeded project and retain LTD's dwindling resources for more cost
 22 effective and needed basic service in our community." (Ex. 2).

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⁹ Macherione's opposition to the spending of tax dollars on the WEEE dominated his comments during his extensive participation in the public process for the project. (*See e.g.* AR118792; AR29013-14; AR57775; AR76990-91; AE135640-43; AR78617-18).

III. ARGUMENT

A. The Court Lacks Subject-Matter Jurisdiction To Hear Plaintiffs' NEPA Claims

The Court must resolve challenges to its jurisdiction before addressing the case on its merits. *Campbell v. Jilik*, 2010 WL 2605239, at *4 (W.D. Wash. June 25, 2010). Plaintiffs' Complaint and Motion are devoid of the required factual predicate for establishing that OMOT or Macherionne, its spokesperson, have standing to bring this suit.

1. Plaintiffs Lack Constitutional Standing To Bring Their NEPA Claims

Article III, Section 2 of the U.S. Constitution limits the federal courts to adjudicating actual cases or controversies. "[A]n essential and unchanging part" of this requirement is that the plaintiffs have standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The party invoking federal jurisdiction has the burden of establishing standing. *Id.* at 561. To satisfy Constitutional standing requirements, a plaintiff must show: (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* at 560.

a. **Plaintiffs Have Not Suffered An Injury In Fact**

OMOT alleges that it and its members will suffer "irreparable harm" as a result of the WEEE. (Dkt. No. 1 at ¶ 17.) To assert the standing of its members, an organization must make "specific allegations establishing that at least one identified member [] suffered or would suffer harm" *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009). "[G]eneralized harm ... will not alone support standing." *Id.* at 493. The bald allegation that OMOT and its members "are adversely affected and aggrieved by....the WEEE, and by the adverse environmental effects the WEEE will have on Eugene, Oregon" fails to set forth any concrete or particularized harm. (Dkt. No. 1 ¶ 13.) The similarly conclusory allegations of spokesperson Macherione -- the lone OMOT member named in the Complaint -- that he will "suffer injury from the noise, air pollution, vibration, aesthetic and other environmental effects caused by the construction and operation of

1 the WEEE" are also unavailing. (Dkt No. 1 at ¶ 15.) These general allegations do not set forth
2 any specific facts about the imminent, particularized injury Macherione will suffer from the
3 agencies' action. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888–89 (1990) (Conclusory
4 allegations in a complaint or other pleading are insufficient to establish standing on summary
5 judgment.). Moreover, far from "actual or imminent," the harms Macherione alleges are
6 speculative, at best, particularly given the FTA's determination in the FONSI that each of these
7 alleged injuries will be mitigated below the level of significance, if not non-existent.¹⁰

b. Plaintiffs' Alleged Injuries Are Not Redressable

9 The relief Plaintiffs seek cannot remedy the vague allegations of "adverse environmental
10 effects" that they half-heartedly allege. (Dkt. No. 1 ¶13). These generalized allegations of
11 environmental harm are but a thin veil for Plaintiffs' true purpose in bringing the suit -- to block
12 the spending of tax dollars on public transit projects. (See Ex. 1, 2 and 3). This is plain given that
13 Plaintiffs have failed to specify what measures Defendants could take to mitigate the supposed
14 injuries they allege. *See Forest Stewardship Council-U.S. v. Office of U.S. Trade Representative*,
15 405 F. App'x 144, 146 (9th Cir. 2010) (plaintiffs could not establish a redressable injury where
16 they could not point to any specific measure short of scrapping the proposed action that would
17 mitigate the alleged environmental harm). Indeed the only relief Plaintiffs will accept is to stop
18 the project, or move it to Plaintiffs' preferred route; relief that is not available under NEPA.¹¹

2. Plaintiffs Lack Prudential Standing To Make A NEPA Claim

21 In addition to the Constitutional requirements, Plaintiffs must establish that they have
22 prudential standing. *Nev. Land Action Ass'n v. United States Forest Serv.*, 8 F.3d 713, 715–16

23 ¹⁰ As explained in the FONSI, each of Macherione's injuries, to the extent they are expected to have any impact, will
24 be mitigated below any significance. *See* Noise and Vibration, AR115168-69; Air Quality, AR115164, AR0115169-
25 71. *See also* AR115162 ("FTA finds that with the accomplishment of these mitigation commitments, LTD will have
taken all reasonable, prudent, and feasible means to avoid or minimize any potential significant impacts from the
proposed action.")

26 ¹¹ Plaintiffs' preferred route will have greater environmental impacts. In turn, even if the WEEE is stopped as
27 Plaintiffs' want, the fact is that traffic -- much dirtier, louder vehicles -- will still continue to pass in front of these
business. Plaintiffs' myopic attack on the WEEE fails to account for the simple fact that this vital mass transit
project will result in a net gain for the environment.

1 (9th Cir.1993). To establish prudential standing, Plaintiffs must show that they have an interest
 2 "arguably within the zone of interests to be protected or regulated by the statute or constitutional
 3 guarantee in question" thereby "exclud[ing] those plaintiffs whose suits are more likely to
 4 frustrate than to further statutory objectives." *Id.* at 716. The zone of interest NEPA protects is
 5 environmental. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005).

6 a. Plaintiffs' Injuries Are Not Within The Zone Of Interest

7 The injuries Plaintiffs allege are not within NEPA's zone of interest. OMOT is "transit
 8 watchdog group" that expresses no environmental interests whatsoever. Macherione is a business
 9 owner whose opposition to the project stems not from any environmental effects, but from the
 10 use of tax dollars on the project.¹² These concerns are wholly outside NEPA's zone of interest
 11 and, therefore, insufficient to establish OMOT's and Macherione's standing. *See Fitzgerald*
 12 *Reno, Inc. v. U.S. Dep't of Transp.*, 60 F. App'x 53, 53-54 (9th Cir. 2003) (finding plaintiffs
 13 whose "expressed concerns" were about their business did not have standing to bring NEPA
 14 claim despite also making allegations regarding noise, dust, vibrations and fumes); *Ashley Creek*
 15 *Phosphate Co.*, 420 F.3d at 945 ("purely economic injury that is not intertwined with an
 16 environmental interest" is outside of NEPA's zone of interest); *Western Radio Servs. Co. v.*
 17 *Espy*, 79 F.3d 896, 903 (9th Cir.1996) (plaintiff, whose only complaint was that agency action
 19 would cause economic harm, asserted an interest outside NEPA's zone of interests).

20 Plaintiffs' passing mention of "environmental harm" in the Complaint, and as an
 21 afterthought in their Motion is ancillary to their true purpose -- stopping a project they believe is
 22 "unneeded." (*See* Ex. 1, 2 and 3). This is insufficient to establish that the injuries they allege fall
 23 within NEPA's zone of interest. For a plaintiff's interest to fall within NEPA's zone of interests,
 24 it "must be systematically, not fortuitously or accidentally aligned with those that Congress
 25 sought to protect." *Cal. Forestry Ass'n v. Thomas*, 936 F.Supp. 13, 22 (D.D.C.1996) (quotation
 26

27 ¹² To the extent there is any relevance to the fact that the hybrid buses will pass in front of his business, Macherione
 has made clear that the intent of this suit is to stop the project, or re-route it to a residential neighborhood, neither of
 which would alleviate its environmental effects. *See supra* at 8. In fact, such relief would have the opposite effect.

1 marks omitted). Plaintiff's cursory mention of "adverse environmental impacts" in the Complaint
2 cannot hide that their true, stated interest is the project's cost, not any environmental impacts.

b. **OMOT Does Not Have Organizational Standing**

4 "An association has standing to bring suit on behalf of its members when its members
5 would otherwise have standing to sue in their own right, the interests at stake are germane to the
6 organization's purpose and neither the claim asserted nor the relief requested requires the
7 participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl.*
8 *Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). As discussed above, OMOT has failed to establish
9 that spokesperson Macherione has standing to sue in his own right. In addition, OMOT has not
10 demonstrated its purpose is germane to the environmental interest at stake in the WEEE. OMOT
11 is a "transit watchdog group" whose core purpose is not environmental. OMOT's primary
12 concern is that the money for the project "is not 'free' money. These are OUR tax dollars."¹³ (See
13 Ex. 1 at 1). In fact, not one of the 13 specific concerns raised by OMOT regarding the WEEE
14 project on its website relates to the "adverse environmental impacts" it alleged in the Complaint.
15 (Id.) OMOT cannot recast itself for the purposes of establishing standing. *See Ranchers*
16 *Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d
17 1078, 1104 (9th Cir. 2005) (holding that a nonprofit association that described itself as a
18 representing members in "issues concerning international trade and marketing" could not
20 establish its NEPA interest were germane to its purpose); *Fitzgerald Reno, Inc. v. U.S. Dep't of*
21 *Transp.*, 60 F. App'x 53, 54 (9th Cir. 2003) (taxpayer organization whose purported
22 environmental interests were not germane to its members did not have standing to bring NEPA
23 claim). OMOT and Macherione clearly explained the purpose of their motion: "the intent of the
24 suit is to stop this unneeded project." (Ex. 2). Accordingly, Plaintiffs cannot demonstrate that the
25 environmental concerns are germane to its purpose, and it therefore, Plaintiffs do not have
26 standing to pursue this claim.

²⁷ ¹³ In turn, several environmental groups supported the WEEE, including the Oregon League of Conservation Voters (AR78687-88) and the 1000 Friends of Oregon. (AR77647) (comment of Rob Zako).

1 **B. The Environmental Assessment For The WEEE Satisfies NEPA's Requirements**2 **1. Standard of Review**

3 "NEPA imposes only procedural requirements on federal agencies with a particular focus
 4 on requiring agencies to undertake analyses of the environmental impact of their proposals and
 5 actions." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756–57 (2004). Accordingly, a court's
 6 "only role is to insure that the agency has taken a 'hard look' at the environmental consequences
 7 of the proposed action." *Druid Hills Civic Ass'n v. Fed. Highway Admin.*, 772 F.2d 700, 709
 8 (11th Cir. 1985). *See also Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1124 (9th
 9 Cir. 2012). A "hard look" requires a "full and fair discussion of significant environmental
 10 impacts." 40 C.F.R. § 1502.1. NEPA's goal is satisfied once this information is properly
 11 disclosed. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

12 Under NEPA, 42 U.S.C. § 4321 *et seq.*, the central question is whether the agency
 13 adequately considered relevant factors, disclosed the environmental impacts of its actions during
 14 the decision making process and explained its determination. *Native Ecosystems Council v. U.S.*
 15 *Forest Serv.*, 428 F.3d 1233, 1239 (9th Cir. 2005). Only if the agency's analysis of
 16 environmental consequence is "arbitrary and capricious" or "contrary to the procedures required
 17 by law" can the court conclude that the agency did not take a "hard look." *Inland Empire Pub.*
 18 *Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 763 (9th Cir. 1996). Where, as in this case, a
 19 court is reviewing an agency action primarily involving issues of fact requiring review of
 20 "scientific judgments and technical analysis within the agency's expertise," the court "generally
 21 must be at its most deferential." *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051 (9th
 22 Cir. 2012) (quotation marks omitted). "The agency need not have reached the same conclusion
 23 that the reviewing court would reach; the agency must merely have reached a conclusion that
 24 rests on a rational basis." *City of Oxford v. FAA*, 428 F.3d 1346, 1352 (11th Cir. 2005).

26

27

1 The EA for the WEEE was not arbitrary and capricious under NEPA. Plaintiffs' 2 opposition to the WEEE project and disagreement with the selection of West 6th/7th Avenue as 3 the LPA does not create a genuine issue of material fact, or establish a violation of NEPA.

4 **2. The Purpose and Need Statement Reasonably Defined the WEEE's**
 5 **Objectives**

6 Plaintiffs allege that the agencies contrived a Purpose and Need Statement that 7 impermissibly narrowed the alternatives ultimately considered in the EA. (Dkt. No. 29 at 14-16). 8 A statement of purpose and need must "briefly specify the underlying purpose and need to which 9 the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. 10 § 1502.13. The scope of alternatives analyzed depends on the purpose and need specified in the 11 statement. *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest* 12 *Serv.*, 689 F.3d 1060, 1069 (9th Cir. 2012). The agency need only evaluate alternatives that are 13 "reasonably related to the purposes of the project." *Id.* Courts evaluate a Statement of Purpose 14 and Need for reasonableness and give the agencies considerable discretion to define the project's 15 purpose and need. *Id.* at 1069-71.

16 Here, the adopted purpose of the transit agency "is to implement high-capacity public 17 transportation service, in the West 11th Corridor (east/west)...that is less hindered by congestion 18 and that provides efficient, effective, dependable, and visually appealing service throughout the 19 life of the project." (AR118850). The "touchstone" of the Court's inquiry when reviewing a 20 Purpose and Need Statement is whether the resulting alternatives analysis "fosters informed 21 decision-making and informed public participation." *See League of Wilderness*, 689 F.3d at 22 1071.¹⁴ Here, far from eliminating any options or predetermining the outcome, after developing 23 the Statement, the agencies engaged in a six-year public process that studied scores of public 24 transit alternatives along the West 11th Avenue Corridor including a TSM alternative, as well as 25 multiple regular bus and BRT route alternatives. *See supra* at 1-8. LTD consistently used the 26

27 ¹⁴ The agencies went above and beyond the requirements of NEPA by even subjecting Statement of Purpose and Need to multiple the rounds of public comment and input.

1 eight criteria set forth in that Statement, (*see supra* at 3), to evaluate each alternative. *See supra*
 2 at 1-8. No alternative was eliminated without detailed study and public participation.

3 Consistent with their opposition to the spending of tax dollars on the WEEE generally,
 4 Plaintiffs argue that the transit agencies' adopted purpose of utilizing "high-capacity
 5 transportation service" to solve local transportation issues impermissibly led to the elimination of
 6 the TSM alternative -- a bandage of small low-cost improvements to the existing system. (Dkt.
 7 No. 29 at 15). Importantly, Plaintiffs omit the fact that the TSM alternative was considered
 8 throughout the various stages of the WEEE study, and included among the final twelve
 9 alternatives extensively studied in the published Alternatives Analysis ("AA"). As detailed in the
 10 AA, the TSM alternative was properly eliminated at that point because the high operating cost
 11 per trip made it incompatible with the WEEE's goals. (AR118868). *See Native Ecosystems*
 12 *Council*, 428 F.3d at 1248 ("it makes no sense" for agencies "to consider alternatives that do not
 13 promote the goal" or the "purpose" that agency is trying to accomplish) (internal quotation marks
 14 omitted). In any event, even if LTD had narrowed the statement to allow consideration of only
 15 BRT alternatives, the record makes clear that LTD considered more than 50 BRT alternatives
 16 during the six-year study. *See HonoluluTraffic.com v. FTA*, No. 13-15277, slip op. at 16-18 (9th
 17 Cir. Feb. 18, 2014) (a public transit project's purpose "to provide high-capacity transit in the
 19 highly congested east-west transportation corridor" was reasonable because it was broad enough
 20 to allow the agency to assess various routing options); *Westlands Water Dist. v. U.S. Dep't of*
 21 *Interior*, 376 F.3d 853, 866-67 (9th Cir. 2004) (agency that limited its purpose and need to
 22 consideration of only one method was not impermissibly narrow).¹⁵ The agencies are entitled to

23 ¹⁵ The cases Plaintiffs rely on are distinguishable. In *National Parks & Conservation Assn. v. Bureau of Land*
 24 *Mgmt.*, 606 F.3d 1058 (9th Cir. 2009), the Court held that a statement that allowed for the consideration of only
 25 alternatives that would satisfy the business needs of a private corporation to the exclusion of alternatives that would
 26 satisfy the public need, but eliminate the corporation's interest, was too narrowly drawn. That is plainly not the
 27 situation here. Indeed, to the extent that private interests are attempting to assert themselves over the public need
 here it is Plaintiffs' private interest in pushing their preferred alternative over the LPA. Similarly, the 7th Circuit in
Simmons v. U.S. Army Corps of Engineers, 120 F.3d 664 (7th Cir. 1997), held that a purpose and need statement that
 by its very definition only allowed one alternative at the start of the process was inadequate. Here, even if LTD had
 only studied BRT for the WEEE, which it did not, it is undisputed that it studied 56 BRT alternatives. (AR118831).

1 deference for this lengthy, detailed, public process.

2 Moreover, Plaintiffs' contention that there is no "need" for the WEEE (based on a three-
 3 year old news article about LTD's budget cuts) is without merit.¹⁶ (Dkt. No. 29 at 17). Similarly
 4 without merit, is Plaintiff's cherry-picking of one need -- to address present traffic congestion --
 5 among nine detailed in the Statement. Need can be interpreted broadly, and the agency has
 6 discretion to determine which public needs it will consider. *Alaska Survival v. Surface Transp.*
 7 *Bd.*, 705 F.3d 1073, 1085 (9th Cir. 2013). It is appropriate for the need statement to include the
 8 region's growth projections. *See id.* at 1086 (finding adequate a statement of need that the
 9 proposed action will serve "as a catalyst for economic development" in the future). As detailed in
 10 the Statement, the projected growth in population and employment along the Corridor will
 11 increase demand and operating expenses for the current public transit system that must be met
 12 while protecting the wetlands, rare plants, and animals along the Corridor. (AR118850-51.) For
 13 these reasons, the two thirty-year old cases from other circuits that Plaintiff relies on to allege
 14 that there was no determination of need for the WEEE are unavailing. (Dkt. No. 29 at 17).

15 The Statement for the WEEE was not drafted to predetermine the outcome of the
 16 alternatives analysis. LTD worked *with* local agencies, and the public to develop it over several
 17 months, and it guided the subsequent informed public decisionmaking process. The Ninth Circuit
 18 has recognized that engaging in precisely this type of meticulous public decision making
 19 demonstrates the agency "thought hard" about the purpose and need for the project and resulted
 20 in an adequate Statement. *See Ala. Survival*, 705 F.3d at 1085.

22 **3. Consideration of the LPA and No-Build Alternative in the EA Was Proper**

23 Plaintiffs argue that the EA is arbitrary and capricious because it failed to choose
 24 Plaintiffs' preferred alternative -- the West 13th Avenue-West 11th Avenue alignment. (Dkt. No.
 25

26 ¹⁶ Contrary to Plaintiffs' mischaracterization of the article, it does not report that the Line 30 was taken out of
 27 service due to low ridership. Instead, the article reports that service for several regular bus lines was cut in April
 2010 as a result of a budget shortfall facing LTD because of shrinking payroll taxes. Importantly, the article makes
 clear that many of the affected regular bus routes were now serviced by the fully operational Gateway EmX line.

1 29 at 10-14).¹⁷ Plaintiffs ignore the year-long process that yielded thousands of public comments
 2 on the Draft AA, and the study by the Joint LPA Committee, that ultimately resulted in a
 3 mitigated version of the West 6th-West 7th Avenue alternative being identified as the LPA.

4 Following this public process, the EA for the WEEE properly considered two remaining
 5 alternatives: a No-Build alternative and the LPA.¹⁸ The Ninth Circuit holds that under "the less
 6 stringent requirements for an EA," consideration of two alternatives -- a no-action alternative and
 7 a LPA -- is sufficient under NEPA. *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1023
 8 (9th Cir. 2012). NEPA's "statutory and regulatory requirements ... do[] not dictate the minimum
 9 number of alternatives that an agency must consider." *Native Ecosystems Council*, 428 F.3d at
 10 1233 (upholding an EA that considered only a no-action alternative and a preferred alternative).
 11 Specifically, the Ninth Circuit has held that consideration of appropriate alternatives in an EA
 12 requires only analysis of a no-action alternative and a preferred alternative. *Id.*; *Earth Island*
 13 *Institute*, 697 F.3d 1010. *See also North Idaho Community Action Network v. U.S. Dep't of*
 14 *Transp.*, 545 F.3d 1147, 11543-54 (9th Cir.) (holding that an EA that "briefly discussed" a no
 15 action alternative and a preferred alternative was sufficient under NEPA).

16 In any event, the EA cannot be considered in a vacuum. The EA built on the six years of
 17 public alternatives analysis conducted before it, as discussed above. *See supra* at 1-8. NEPA's
 19 requirements are met "[s]o long as 'all reasonable alternatives' have been considered and an
 20 appropriate explanation is provided as to why an alternative was eliminated." *Native Ecosystems*
 21 *Council*, 428 F.3d at 1246. Scores of alternatives were considered for the WEEE during the
 22 lengthy study, and ultimately twelve, including Plaintiffs' preferred alternative -- the West 13th
 23 Avenue-West 11th Avenue alternative -- were studied in detail in the AA. Far from failing to
 24

25 ¹⁷ Notably, Plaintiffs do not contend that any of the other routes eliminated during this process, including all West
 26 6th/7th Avenues-West 7th Place alternatives should have been considered in the EA. This further demonstrates that
 this case is about Plaintiffs' preferred alternative and not about the environmental effects of the WEEE.

27 ¹⁸ The EA dedicated a chapter to discussing all of the alternatives considered throughout the study, and explaining
 the analysis process. (AR118857-95). Moreover, the Final Alternatives Analysis, Technical Reports, and various
 other project documents were attached to the EA. (AR118813).

1 give "full consideration" to Plaintiffs' preferred alternative, as they have alleged, the record
 2 demonstrates the careful balancing and study that went into the elimination of that route and
 3 chronicles the changes that ultimately made the mitigated West 6th Avenue- West 7th Avenue
 4 alternative the best one from an environmental standpoint. *See HonoluluTraffic.com*, No. 13-
 5 15277, slip op. at 19 (an agency does not violate NEPA by not expressly considering in an EIS
 6 alternatives that had previously been ruled out during the screening process). Specifically, the
 7 LPA avoided wetlands, Amazon Creek and the adjacent trail, lessened the need for street
 8 improvements that would impact historic properties, required less property acquisition,
 9 minimized adverse impacts to established residential neighborhoods, and saved trees.
 10 (AR118748). *See also supra* at 4-7. This careful study rebuts the "obvious viability" of Plaintiff's
 11 preferred alternative and was far more complex than Plaintiffs suggestion that the agencies
 12 should simply draw a "straight line". (Dkt. No. 29 at 5, 11).

13 For these reasons, the EA for the WEEE is distinguishable from the EA before the court
 14 in *Western Watersheds Project v. Abbey*, 719 F.3d 1035 (9th Cir. 2013) -- the lone authority
 15 Plaintiffs rely on. In that case, all alternatives the federal agency considered in the EA, including
 16 the no-action alternative, would result in the proposed action being approved. *Id.* at 1051. Here,
 17 far from considering alternatives that would all lead to the same result, the alternatives in the EA
 19 considered two options -- implementing BRT service to serve current and future public transit
 20 needs, or taking no action to remedy the congestion and lack of transit options.

21 Neither does Jarrette Walker's report undermine the process by which Plaintiffs'
 22 preferred alternative was eliminated. (Dkt. No. 29 at 13). The report was commissioned by the
 23 new General Manager for LTD -- who took office near the end of the WEEE study -- as part of
 24 his due diligence. (AR115273-74). The report was based on an analysis of existing data, and
 25 some interviews, and concluded that the LPA was a reasonable alternative. *Id.* It was not the
 26 "devastating critique" Plaintiffs contend. (Dkt. No. 29 at 14). In any event, the report's
 27 conclusion is immaterial. *See Edwardsen v. U.S. Dep't of Interior*, 268 F.3d 781, 786 (9th Cir.

1 2001) (the fact that an agency's approach has been critiqued does not render an EIS arbitrary and
 2 capricious); *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1359 (9th Cir. 1994)
 3 (it is not for the court to resolve disagreements among experts under NEPA). Thus, NEPA does
 4 not require unanimity of opinion. What is important is that the report was considered by the
 5 agencies involved and made available for the public's review, which it undeniably was.
 6 (AR115274). *See Robertson*, 490 U.S. at 349 (NEPA's goal is satisfied once information
 7 disclosed to the public). Plaintiffs' arguments to the contrary omit the comments about the report
 8 they submitted with their comments on the EA. (AR79500-64).

9 As the foregoing demonstrates, neither the process of evaluating alternatives that resulted
 10 in the selection of the West 6th/7th Avenues-West 11th Avenue alternative as the LPA, nor the
 11 consideration of the LPA and No-Build alternatives in the EA, was arbitrary and capricious.

12 **4. Mitigation Of Environmental Impacts in EA Supports The FONSI**

13 Plaintiffs allege that the temporary and *de minimis* environmental impacts disclosed in
 14 the EA (parking, noise and vibration, geology and seismic activity, and wetlands impacts) are
 15 significant enough to warrant preparation of a full blown EIS. (Dkt. No. 29 at 17-20). Merely
 16 identifying some information favorable to their position, as Plaintiffs do here, does not raise a
 17 substantial question about the significance of the project's environmental effects. *Native*
 19 *Ecosystems Council*, 428 F.3d at 1240 ("We decline to interpret NEPA as requiring the
 20 preparation of an EIS any time that a federal agency discloses adverse impacts...or acknowledges
 21 information favorable to a party that would prefer a different outcome."). In addition, Plaintiffs
 22 ignore the fact that the EA includes binding mitigation measures that specifically address these
 23 issues and the obvious fact that the overall impact of this green transit project is a net gain for the
 24 environment. (AR115284-301).

25 NEPA does not require an agency to develop any particular mitigation measures. *Pac.*
 26 *Coast Fed'n of Fishermen's Associations v. Blank*, 693 F.3d 1084, 1103-04 (9th Cir. 2012).
 27 Moreover, the agency is "not required to develop a complete mitigation plan detailing the

1 'precise nature of the mitigation measures.' *Id.* at 1103. An agency is merely required to develop
 2 potential mitigation measures "to a reasonable degree." *Tillamook Cnty. v. U.S. Army Corps of*
 3 *Eng'rs*, 288 F.3d 1140, 1144 (9th Cir.2002). The proposed measures must be discussed in
 4 sufficient detail to ensure the environmental consequences are fairly evaluated, and to allow an
 5 assessment of whether the measures can be effective. *See Pac. Coast Fed'n of Fishermen's*
 6 *Associations*, 693 F.3d at 1103-04.

7 Here the lengthy record establishes that the agencies took a "hard look" at the four issues
 8 Plaintiffs cite to and worked to develop binding mitigation measures to reduce the impacts below
 9 the level of significance.

- 10 • Parking Impacts: The mitigation measures the EA details, including restriping, relocating affected driveways and compensating affected owners for the loss, would reduce the lost off-street parking spaces from 72 to a mere 18. (AR118917). "[O]n-street parking utilization in the Corridor is below a level that would require mitigation." (AR118835).
- 11 • Noise and Vibration Impacts: Contrary to Plaintiffs contention about the lack of specificity of the measures, (Dkt. No. 29 at 20), the EA stated that the project specifications would include five specific noise abatement measures, and employ a construction communications liaison to address specific problems that may arise. (AR118945-46). Importantly, the EA notes that "[u]nder the No-Build Alternative, noise levels throughout the project study area would continue to increase as traffic volumes along the established truck routes increase," and that this level would exceed ODOT's Noise Abatement Criteria. (AR118941).
- 12 • Geology and Seismic Activity Impacts: Not only is the LPA not anticipated to create adverse impacts in this area, but it "could also create benefits, including stabilization of the Amazon Channel banks." (AR118978). The EA noted geotechnical studies would be required to create the design appropriate for the area's subsurface conditions. (AR118979. *See* AR0118977-79). Plaintiffs' argument that somehow this study must be conducted before the project is even funded, (Dkt. No. 29 at 20), defies logic.
- 13 • Wetlands Impacts: It is a gross misstatement to argue, as Plaintiffs do, that the EA "fails to provide any specifics" concerning mitigation of impacts to wetlands. (Dkt. No. 29 at 20). The WEEE would impact 0.048 acre of wetland. (AR118994). The EA identifies eleven mitigation measures for this small area, including planning native trees and shrubs, and removing non-native invasive plant species from wetlands. (AR118996. *See also* AR118988-96).

14 In short, the EA identifies potential mitigation measures to the reasonable degree NEPA
 15 requires. Plaintiffs exaggerate the amount of harm from the project, (*i.e.*, operating hybrid buses

1 on existing roads and implementing numerous traffic improvements), and undervalue the
 2 required mitigation measures. Contrary to Plaintiffs' argument that the mitigation measures are
 3 "unenforceable" because of the "qualifying" language used to describe them, (Dkt. No. 29 at 18-
 4 19), the FONSI specifically states that any FTA funding is conditioned upon LTD's compliance
 5 with the mitigation commitments described in the EA. (AR115284-AR115301). *See Pac. Coast*
 6 *Fed'n of Fishermen's Associations*, 693 F.3d at 1103 (mitigation plan need not "be legally
 7 enforceable, funded or even in final form to comply with NEPA's procedural requirements.").¹⁹

8 In these ways, the EA for the WEEE is distinguishable from the authority Plaintiffs cite.
 9 Specifically, unlike with respect to cruise ships being allowed in Glacier Bay National Park,
 10 there is no uncertainty about any environmental effects here, including concerning the 0.048 acre
 11 of wetlands potentially affected by the WEEE. *See National Parks & Conservation Ass'n v.*
 12 *Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001). Moreover, unlike in *Neighbors of Cuddy Mountain v.*
 13 *U.S. Forest Serv.*, here there is no question that the mitigation measures specifically address the
 14 impacts of the WEEE. 137 F.3d 1372, 1381 (9th Cir. 1998) (rejecting the U.S. Forest Service's
 15 generalized and vague mitigation references where the measures did not even concern the creeks
 16 actually affected by the proposed action). Finally, much in contrast to the mitigation measures in
 17 *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998), the identification of the
 19 impacts of the WEEE and enforceable mitigation measures for those impacts is supported by
 20 hundreds of pages of analytical data, made available to the agencies involved and the public, and
 21 attached to the EA. *See supra* at 3 n. 3.

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24 ¹⁹ This language requiring the implementation of the mitigation measures detailed in the EA, along with the
 25 extensive public process during which these mitigation measures were developed follows the Council on
 26 Environmental Quality's most recent guidance concerning the development of mitigation measures, and reliance
 27 upon them to issue FONSI's. *See* Final Guidance for Federal Departments and Agencies on the Appropriate Use of
 Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 76
 Fed. Reg. 3843-01 (Jan. 21, 2011) (to be codified at 40 C.F.R Parts 1500, 1501, 1502, 1505, 1506, 1507, and 1508).
 Specifically, the mitigation measures are incorporated into the WEEE's design, the FTA reviewed carefully and
 adopted those measures in the EA and FONSI, and FTA has ensured the mitigation commitments will be
 implemented by conditioning funding on compliance those measures. *Id.* at 3847-48.

1 **5. EA Properly Considered All Effects**

2 Finally, Plaintiffs claim that the EA failed to address the cumulative impacts the WEEE
 3 will have on future traffic along the West 6th/7th Avenue corridor, and that the WEEE conflicts
 4 with the future land use plan for the City. (Dkt. No. 29 at 21-25). These are arguments are
 5 without merit. NEPA requires an agency to consider the cumulative impacts of a project. 40
 6 C.F.R. § 1508.27(b)(7). These are the impacts "on the environment which results from the
 7 incremental impact of the action when added to other past, present, and reasonably foreseeable
 8 future actions." 40 C.F.R. § 1508.7. The present and reasonably foreseeable future traffic impacts
 9 of the WEEE on traffic along the WEEE route were studied in detail and discussed in the EA.
 10 (See AR119033-84). Similarly, the nodal development the WEEE will support has been
 11 recognized in the city's land used plans as a future goal. (AR119027). In sum, neither of these
 12 random objections demonstrates that the EA was arbitrary and capricious.²⁰

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²⁰ Plaintiffs also argue that the EA fails to make meaningful consideration of the impacts of the WEEE on minority populations. The Ninth Circuit does not allow a cause of action under Executive Order 12898. *Morongo Bank of Mission Indians v. FAA*, 161 F.3d 569, 575 (9th Cir.1988). However, even if judicial review were available under NEPA and the APA, the agencies here not only concluded that the minority population and low income populations would not be disproportionately affected by the Project, but that they would greatly benefit. (AR119122-25).

IV. CONCLUSION

For these reasons, Defendant Intervenor Lane Transit District respectfully requests that the Court deny Plaintiffs' Motion for Summary Judgment and grant LTD's Motion for Summary Judgment.

DATED this 28th day of February, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DEFENDANT INTERVENOR LANE
ANSIT DISTRICT'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT on the following persons
CM/ECF electronically mailed notice from the Court on the date set forth below:

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DATED this 28th day of February, 2014.

s/ Louis A. Santiago
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